

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

OCTOBER 17, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1064-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

ROBERT E. WILLIAMS,

Petitioner-Appellant,

v.

GWEN A. BRADLE-WILLIAMS,

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Douglas County:
JOSEPH McDONALD, Judge, and WILLIAM CHASE, Reserve Judge.¹
Affirmed.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Robert Williams appeals a divorce judgment, contending that the trial court erroneously awarded to his former wife, Gwen

¹ The Honorable William Chase, Reserve Judge, presided over trial in this matter. The Honorable Joseph McDonald entered judgment of divorce on April 6, 1995, and an amended judgment was entered April 24, 1995, signed by William Chase, Reserve Judge.

Bradle-Williams, one-half the increase in his savings account.² He also argues that the trial court erroneously considered the issue of marital misconduct. We affirm the judgment.

The parties were married in July 1991. Gwen, age forty-two, earned approximately \$21,000 per year, and Robert, age fifty-one, earned approximately \$31,000 per year. Before the marriage, Robert had a savings account of \$20,000. It increased by \$17,000 during the marriage due to accumulated interest and contributions from Robert's earnings. Both parties owned their own residences at the time of the marriage. In August 1991, Robert loaned Gwen \$1,100 to pay her fuel oil bill. In March 1992, Gwen sold her residence and repaid Robert \$1,100 from the approximately \$2,000 in proceeds from the sale. The couple began to live together at Robert's residence. Robert disputed Gwen's testimony that she paid for the utilities, telephone and groceries at Robert's house. The couple kept separate accounts and acquired no jointly titled assets during their marriage.

The trial court divided equally the amount that Robert's savings account increased from the date of the marriage to the date the divorce action was filed. It stated:

The reason respondent is awarded the above, she did not seek attorney fees, maintenance payments, 50% of the entire savings account plan, 50% of petitioner's interest in the home, nor did she ask to be awarded 50% in petitioner's pension plan, which she was presumptively entitled to. Petitioner gets well over 50% of his estate, plus petitioner was kept out of the house because of a restraining order.

Property division is addressed to trial court discretion. *Forester v. Forester*, 174 Wis.2d 78, 91, 496 N.W.2d 771, 777 (Ct. App. 1993). Discretion requires a rational process in which the facts of record and relevant legal principles are considered to achieve a reasoned determination. *Bahr v. Bahr*, 107 Wis.2d 72, 78, 318 N.W.2d 391, 395 (1982). The appellate court reviews the

² This is an expedited appeal under Rule 809.17, STATS.

record to determine whether discretion was exercised and whether the record supports the determination. See *Vier v. Vier*, 62 Wis.2d 636, 639-40, 215 N.W.2d 432, 433-34 (1974).

Because the parties' property was not derived by gift or inheritance, an equal property division is presumed. Section 767.255(3), STATS. The court may alter the presumed equal division, without regard to marital misconduct, after considering the factors outlined in § 767.255(3), including the length of the marriage, the property brought to the marriage by each party, the parties' contributions to the marriage, their earning capacities and other economic circumstances.

Robert argues that the trial court unreasonably exercised its discretion when it awarded Gwen one-half the increase in his savings account. He argues that it failed to consider the § 767.255(3), STATS., factors. He further contends that the increase in the savings was due entirely to his efforts, the parties kept their incomes separately, and Gwen contributed only upkeep and utilities while living in the family home.

We reject Robert's argument that Gwen must prove that she contributed to the increase in the savings account in order to be awarded one half. To the contrary, § 767.255, STATS., specifically presumes that each party is entitled to one-half of the assets.

We conclude that the record supports the trial court's exercise of discretion. The trial court applied the presumed 50% division to only a part of one of the assets of the marital estate. Given the length of the marriage, the property brought to the marriage and the parties' economic circumstances, the court was entitled to alter the 50% division and apply it in this limited respect.

Robert next argues that the trial court erroneously referred to the restraining order that prohibited him from living in the home and entered the property division to penalize him for misconduct. We disagree. The court's only comment was that "Petitioner gets well over 50% of his estate, plus petitioner was kept out of the house because of a restraining order." The record does not support Robert's assertion the court penalized him. To the contrary, the court awarded him over 50% of the assets subject to division. The court's reference to the restraining order referred to the time that Gwen was living in

the marital home in Robert's absence. She testified that she kept up the home, paid for utilities and upkeep, cared for Robert's son from his prior marriage and did not receive any contribution from Robert during this time. The court's reference implies an apparent finding that it accepted Gwen's testimony that she contributed to maintaining marital assets as credible. Credibility is a trial court, not appellate court, function. Section 805.17(2), STATS. Because the record does not disclose an erroneous exercise of discretion, the judgment is affirmed.³

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

³ We deny Gwen's motion for costs and attorney fees pursuant to § 809.25(3)(a), STATS. We conclude that the record does not demonstrate that the appeal was brought in bad faith, solely to harass respondent, or without any reasonable argument for modification of existing law.